Registries Stakeholder Group Responses to ATRT2 Questions

27 August 2013

Ref: Questions for the ICANN Community on the impact of previous reviews and inputs for the ATRT2

The gTLD Registries Stakeholder Group (RySG) provides the following written responses to the questions from the ATRT2 prior to the ICANN's 47th public meeting in Durban. The questions are shown in regular font (blue) and RySG responses are indented and shown in *italic font*. Note that the level of support from RySG members is provided at the end of this document

1. The ATRT2 is seeking to engage an Independent Expert to assess whether the GNSO PDP process is effective for developing gTLD policy within ICANN's multi-stakeholder environment. In your view, is the GNSO PDP working well, and if not, what needs to be done? Comments are welcome during the ATRT2 face-to-face meeting in Durban, and we are also seeking to identify people or groups that are interested in providing input to the Independent Expert.

The effectiveness of the GNSO PDP depends on the policy development topic and the level of complexity and diversity of stakeholder opinions on that topic.

For example, the series of Inter-Registrar Transfer Policy (IRTP) PDPs seem to have worked well. The first three (IRTP A, IRTP B, & IRTP C) were completed and applicable policy recommendations are being implemented. The last one (a combination of IRTP D & IRTP E, which have since been combined into one PDP (IRTP D) appears to be proceeding well and, like IRTP C, looks like it may be completed in near record time. Here are our thoughts in terms of why the PDP was successful in these cases:

- *The PDP provided clear directions for developing policy in a multi-stakeholder manner.*
- *The policy questions to be considered were divided into more manageable parts and handled separately.*
- *The topic of registrar transfers was not very controversial.*
- *The number of interested stakeholders and more specifically the number of WG participants was small. (Note though that the WGs were all completely open to all.)*
- *There was continuity of participants throughout all the four PDP WGs.*

On the other hand, the PDP about vertical integration was not able to produce even rough consensus on any policy recommendations. Here are our thoughts in that regard:

- *It was a highly controversial subject with strong competing views.*
- *The fact that no policy recommendations were developed may be an*

indication that there is indeed no consensus in the community; if that is true, then it should not be concluded that the PDP was ineffective because it helped the GNSO come to that conclusion.

- *It should be noted that the PDP provided procedures for bringing together impacted stakeholders and it appears that most diverse interests were represented, so in that sense the PDP was effective.*
- *There were strong time pressures to reach closure on this topic but we think that more time probably would not have changed the result.*

A third example is the ongoing PDP on protection of IGO/INGO names. It is true that this PDP has taken longer than many had hoped and we do not yet know what policy recommendations may result. Here is our analysis of this PDP:

- *There are various competing interests on this topic.*
- *There is sentiment from members of the GAC that this is clearly an issue of international law.*
- *In response to a request from the WG, a legal analysis provided by ICANN's General Counsel's office using outside experts did not support the position that international law and national laws definitively require protection of IGN & INGO names.*
- *The WG has been open to all and there has been very good participation by IGOs and INGOs.*
- *The PDP has worked well although not very timely, probably because of the strong competing views.*
- *It is too early to tell whether the WG will be able to make policy recommendations and it seems possible that any such recommendations may at best only have strong support with some opposition.*

2. The multi-stakeholder model presumes we can get substantive involvement from all stakeholders, including those who do not have financial interests at stake. Is that being achieved effectively, and if not, what does ICANN need to change to be able to do it effectively?

The RySG believes the PDP has been successful at getting substantive involvement from all stakeholders except governments. Using the three PDP examples cited in the question 1 response above, participation records demonstrate the following:

- *There has not been substantive participation in the IRTP PDP WGs across all GNSO SGs and constituencies but we believe that the most directly impacted participated in the WGs and that others were able to effectively review the recommendations. Therefore, there was substantive involvement in the final recommendations.*
- *There was substantive involvement in the Vertical Integration PDP.*
- *There has been substantive involvement in the IGO/INGO PDP WG.*

The million-dollar question, however, has been discussed for years: how can we secure

meaningful government/GAC participation in the policy development process itself, rather than after the fact (and sometimes considerably after the fact). We believe that this is critical, but can only reiterate the importance of early engagement to ensure that the GAC and the GNSO understand each other's needs. We acknowledge that this involves a significant departure from typical operating procedures for governmental participants in the ICANN community, and we are encouraged that there appear to be efforts on the part of the GAC and GNSO leadership in this regard.

As pointed out in the RySG meeting with ATRT2 members in Durban, the ALAC is a very positive example of advisory committee involvement in GNSO policy activities. We believe that this is in large part because the ALAC has provided a GNSO liaison that participates regularly and truly serves a true, 2-way liaison function. In addition, other At-Large participants frequently participate in GNSO WGs.

3. There has been a lot of discussion, and some ATRT1 recommendations, related to the Public Comment process. Do you think the process to receive comments is working well, and if not, what needs to be done to fix or change it? For the comments that are received, do you feel that those requested by PDP Working Groups, Staff and the Board are effectively taken into account in ultimate decisions?

The RySG believes that the public comment process is much improved over earlier years. Summaries are regularly provided. Sometimes analysis is included but that analysis is not always very responsive. The Comment Reply period is not enforced as a reply period but that may be okay because frankly it is sometimes difficulty for larger groups to reach agreement on their comments from all their members.

In recent months, however, ICANN Staff and ultimately the Board have ignored community input and then given only a very weak rationale for doing so. Comment periods related to last minute top-down changes in registry and registrar contracting documents have been undertaken as "check-the-box" exercises in support of pre-determined top-down decisions. Examples of this are plentiful in the finalization of the new gTLD registry agreements and in several cases since then. In many cases, the community – motivated by a desire to give new leadership the benefit of the doubt - has been relatively restrained in its response. Unfortunately, ICANN leadership seems to be interpreting restraint as support for unilateral, top-down decision-making. Ultimately, that will undermine ICANN's legitimacy.

With regard to the new gTLD Registry agreement, we note that the summary of public comments was posted less than 24 hours before the new gTLD Program Committee approved the agreement. The public comments were generally ignored and frankly, irrelevant to the Committee's decision-making process.

4. Do you believe that ICANN's organization of Advisory Committees and Support Organizations and their respective internal organizations are effective in achieving ICANN's multi-stakeholder goals, and if not, how should things be changed?

ICANN's ACs and SOs have plenty of room for improvements but we think that they do achieve multi-stakeholder goals. The multi-stakeholder model is inherently messy and slow. The RySG believes that messy and slow is much better than top-down management that compromises the multi-stakeholder model.

Better structures and procedures are needed to support policy iteration and more timely and informed decision-making. That said, we believe that the thorniest problems will only be addressed through better behavior – in particular, greater civility and mutual respect – and the creation over time of a body of substantive ICANN precedent. This is especially true in cases of controversial issues where there are very divergent interests. We all, including the RySG, need to make a commitment to strive to communicate our positions, listen to others' positions and then work together constructively to find solutions that most of us can support even when we do not get everything we want. The ICANN Board and staff, for its part, needs to respect the multi-stakeholder process as well, and to resist the temptation to abuse its leverage to effect top-down results. Ultimately, the community needs a mechanism to incorporate "lesson's learned" into ICANN's policy-making DNA.

5. Do you have any comments with regard to ICANN's implementation of the recommendations of the three earlier AoC Review Teams – Accountability & Transparency, WHOIS, and Security, Stability & Resiliency?

While ICANN has made some progress on implementing certain recommendations of the ATRT, WHOIS, and Security, Stability & Resiliency review teams, much work still needs to be done. In fact, persistent delays and apparent inability or unwillingness to address key issues raise significant doubt about ICANN's commitment to "maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders."

Probably nothing more clearly demonstrates ICANN's lack of seriousness about its accountability and transparency responsibilities than its response to ATRT Recommendations 23 and 25:

- *The December 2010 ATRT final report called on ICANN to create an experts panel to assess and make recommendations for enhancements to ICANN's Reconsideration and Independent Review processes. ICANN staff, however, did nothing with respect to these recommendations until September 11, 2012, when it finally appointed an Accountability Structure Experts Panel (ASEP).*

- *Two members of the ASEP attended the mid-October 2012 ICANN meeting in Toronto. There they met individually with selected members of the community, and held a single public forum on the 17th. Unfortunately, very few members of the community attended that 1-hour, early Wednesday morning session. Furthermore, it quickly devolved into an arcane discussion of the definition of*

"incorrect information" in the Reconsideration process.[1] Most importantly, there was virtually no discussion during the public debate about the Independent Review process, nor discussion of making a fundamental change in the standard of review to be applied in such cases.

- *The ASEP issued its report on 26 October 2012, just 6 weeks after it was appointed. Incredibly, the ASEP recommended radically altering the standard of review to be applied by an Independent Review panel. Now, in considering whether or not an action or inaction by ICANN or the Board violated ICANN's Bylaws, the relevant questions are limited to asking whether or not the Board: (1) acted without conflict of interest in taking its decision; (2) exercised due diligence and care in having a reasonable amount of facts in front of them; and (3) exercised independent judgment in taking the decision, believed to be in the best interests of the company.*

One needs to remember that all of this took place at a time when the community was devoting extraordinarily attention to and energy on the New gTLD Program launch. This important issue simply did not make it onto the community's radar screen. In fact, ICANN received only two comments on the ASEP report. The RySG stated "We believe that this amendment to the Section 4 of the IRP frustrates the overall purpose of the IRP and runs counter to the intent of improving ICANN's accountability mechanisms. [emphasis added] We strongly believe that the amendment to Section 4 should be deleted." The RySG went on to criticize the manner in which this important issue was being handled by ICANN:

> *In our view, the time constraints imposed on the experts' work, the limited opportunity for the community to engage with the experts on this topic, and the development of proposed Bylaws amendment to implement the experts' recommendations prior to community discussion of the report suggests that the work is being driven by a desire to "check off" this item, rather than a desire to "get it right." We believe that the recommendations require further work and refinement to ensure that they will achieve the goal of providing real, practical accountability. We encourage ICANN to solicit more public comment and engage with the community more deeply before it finalizes any changes to these accountability measures.*

The only other commenter, Alejandro Pisanty, noted that "The proposed system does indeed carry the incentive the RySG comment proposes: less and less substantial subject-matter knowledge, more and more legal and procedural knowledge. This may be fundamentally wrong."

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[1] See the "Accountability Structures Expert Panel Wednesday, October 17, 2012 – 08:00 to 09:00 ICANN - Toronto, Canada" transcript at http://toronto45.icann.org/node/34399. In particular, note ICANN Board member Bruce Tonkin's admonition that "We have got 20 minutes left and we got fixated on the definition of 'incorrect information.' Bear in mind, this is PowerPoint. This is not the final form that will go into some bylaws revision."

Notwithstanding the profound importance of the issues at stake, the very clear and strongly negative comments from the RySG, and the fact that the community simply had yet to focus on this issue, the ICANN Board on 11 April 2013 approved – as part of its "Consent Agenda" – an item entitled "Accountabilities Structure Bylaws Effective Date." The item was described to the Board as follows:

> *We had an external review of our accountability mechanisms, and one of the outcomes of that review was the setting up of a standing panel for that Independent Review Panel. We pulled that out as a proposed Bylaw amendment, and one of the pieces of feedback was that there should be an ability to add expertise for change expertise on the panel depending on the case being heard. So in this resolution we're basically approving a change to the Bylaws that incorporates establishing a standing panel and having the ability to add expertise to the panel if that's required.*

The Board transcript from Beijing reflects no Board discussion on this important matter.

The RySG objects in the strongest possible terms to ICANN's willingness to manipulate the results of the ATRT process to reduce its accountability to members of the community who are materially harmed by actions or inactions of the Board or staff that violate the ICANN Bylaws. While the RySG would fully support building legitimate safeguards against frivolous or harassing IRP requests, the recently adopted Bylaws amendment simply deprives the entire community of one of the most important accountability mechanisms that ICANN has ever had.

6. Do you have concerns about ICANN's overall transparency and accountability, or related issues that are specific to your group?

An example of the lack of transparency has been the difficulty of getting ICANN to post its agreements with Deloitte and IBM in support of the Trademark Clearing House. After months of requests, staff finally posted the statements of work for IBM but failed to post the master agreement upon which the statements of work rely.

In addition to the By-laws change described above, one only has to look at the Registry or Registrar agreements to see that ICANN is rarely if ever willing to assume accountability but instead passes it all down to contracted parties, which in turn impacts registrants and users. Liability and indemnification clauses are all one-sided, protecting ICANN the corporation at all costs even if the public interest is not served well.

7. Public comments appear to indicate a concern that there has not been a substantive improvement in accountability and transparency since the ATRT1 Report. What is your impression? What do you recommend we should focus on?

The Registry Stakeholder Group sincerely welcomes ICANN's new leadership and

appreciates the improvements that have accompanied Mr. Chehade's arrival. In particular, the tone and tenor of our interactions with ICANN's leadership have improved reflecting, in our view, both the "pent up good will" of the ICANN community, and Mr. Chehade's more open style. We also, of course, appreciate leadership's efforts to effect change and move important projects forward.

That said, we believe that ICANN remains largely unaccountable to participants in the multi-stakeholder model and to contracted parties. As described above, the "bottom up" policy development process has been sacrificed to expediency and/or symbolic gestures several times in recent months. In connection with the new gTLD program, ICANN has consistently attempted to off-load risk associated with potentially "tough calls" – e.g., on enforcement of the "global PICs" to expensive third-party dispute resolution service providers. (We are continuing to discuss various compromises and remain hopeful about identifying ways to create a more predictable commercial environment with respect to contract enforcement.)

8. Has the Community any specific issues or concerns with other aspects of Security Stability and Resiliency that are outside of DNS specific issue?

These issues have been directly addressed in other forums.

9. In regards to public comments, how do Commenters and Staff/Board deal with the practice of orchestrated, high volume from letter commenting ("astro-turfing")?

We believe that most of us can see through these kinds of efforts. We suggest that this issue be addressed in analyses of public comments.

10. Does the Community embrace decisions made in regards to IP addresses and AS numbers?

We believe so.

11. How can we ensure that ICANN decisions are embraced or accepted? Do you review the decisions? (If not, why not?) If you don't embrace or accept ICANN's decisions, do you feel your opinion was properly understood and considered?

The RySG regularly reviews decisions, especially those that impact our businesses, our customers and the multi-stakeholder model. We embrace some decisions and reject others. We generally believe that our opinions are understood. In some cases our opinions are embraced and in others they are ignored, depending very often on ICANN's assessment of its leverage in any particular situation rather than on the substantive merits of an issue. ICANN's leadership appears to be extraordinarily risk-averse, including in ways that do not always serve the public interest.

12. Is transparency sacrificed for expedience when the Board has a difficult decision to make? If yes, please provide examples.

The new gTLD registry agreement is a case in point. As previously stated, the summary of public comments was posted less than 24 hours before the new gTLD Program Committee approved the agreement. In many cases, the community sentiment was ignored in favor of approaches that "outsourced" risk – e.g., legal risk associated with contract enforcement risk - from ICANN onto a third-party.

13. Is it clear to you that the Board has a dual role as a governance component inside the organization and is the last stop policy organ? [How do you deal with that dual role?]

To the extent that the Board must function as a 'last stop policy organ,' this should only occur in concert and consultation with applicable stakeholders, in particular SOs and ACs. It is particularly important that the ICANN Board not make significant changes in community agreed actions or policies without reasonable interaction with the impacted parties.

14. Are the working methodologies of your group fully accountable and transparent? If not, how could they be enhanced or approved.

We believe they are but welcome suggestions for improvement. Please refer to the end of this document to see how we report the level of support for our RySG statements after they are developed within the RySG.